
Coates' Canons Blog: Free Speech Rights in Government Social Media Sites

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Government agencies are increasingly recognizing the need to communicate with their constituents and to promote citizen participation in government programs and issues. Government web sites have become standard fare, providing information and mostly one-way communication from the government to the public. Government use of more interactive “social media,” such as Facebook and Twitter, raises questions about whether the public has free speech rights in these forums. Can the government limit, screen, or censor comments by the public on its social media sites?

Why limit speech?

The government’s legal ability to allow and control speech in public places has been established through cases involving everything from public parks and public meetings, to license plates, adopt-a-highway signs, advertisements on buses, and even charitable donation programs. Government may choose to limit expressive activity in order to avoid offensive and controversial communication, or to preserve the use of forums the government creates for specific purposes.

Forum Analysis

The extent of governmental control over expressive activity depends on the type of place (or “forum”) in which the activity takes place. This **post** describes the forum analysis courts have applied. A very few places, like public parks and streets, are considered by long history and tradition to be open for expressive activity, and are subject only to content neutral, time, place, and manner restrictions by government. In other places, it is up to the government to decide whether to allow expressive activity, and if so, what types and subject to what limitations. The government can create or “designate” a forum for expressive activity, and limit the categories, as well as the time, place and manner of the speech allowed. Governmental restrictions based on the speaker’s point of view are the most disfavored under this analysis, regardless of the type of forum. So while categories of content can be restricted, government can’t censor a particular point of view about a matter within the category of speech that is allowed.

Forum Analysis Applied to Public Meetings and Websites

This analysis has been applied to public meetings, which are generally considered to be designated or limited public forums. This means that the government may restrict the topics that may be discussed at a public meeting, and may control things like the number of speakers and for how long and on what topics they may speak. But the prohibition on viewpoint discrimination means that the government can’t cut off a speaker who is addressing one of the allowed topics simply because her comments are controversial or critical of the government.

The forum analysis has also been used to analyze restrictions on links to government websites. For example, in *Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834, 841 (6th Cir.2000) the city included on its website links to various community organizations and media outlets, but refused to link to the **Putnam Pit**, a web publication that is critical of the city and its officials. The court held that the city’s website was a nonpublic forum, meaning that the city had not created it as a venue for public discourse, but instead had included links in order to promote the city’s economic welfare, commerce, and tourism. The plaintiff argued that the exclusion of his site amounted to viewpoint discrimination, and the court sent the case back to a jury on that question. Again, even in a nonpublic forum viewpoint discrimination is prohibited. A jury ultimately concluded that the Putnam Pit was not consistent with the category of speech for which the website was created because it did not promote tourism and economic development in the city. See, *Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 76 Fed.Appx. 607, 2003 WL 2200304 (C.A.6 Tenn).

Government Speech vs. Forum Analysis

A U.S. Supreme Court decision, summarized in **another post**, has introduced a new twist in analyzing free speech rights in public places. In a case involving monuments in public parks, the Court held that the placement of the monuments was in fact government speech rather than private speech in a public forum. Under this analysis, viewpoint discrimination is allowed. Since the government is the speaker, it can choose its viewpoint, and can choose third parties through which its viewpoint is expressed.

This analysis has also been applied to cases involving government websites. In *Sutcliffe v. Epping School District*, 584 F.3d 314 (1st Cir. 2009), the court was faced with an argument much like the one in the *City of Cookeville* case. An organization claimed a violation of free speech when they were denied a link to the school's website, while other organizational links were allowed. The court applied the "government speech" analysis:

"(T)he Town engaged in government speech by establishing a town website and then selecting which hyperlinks to place on its website. The Town created a website to convey information about the Town to its citizens and the outside world and, by choosing only certain hyperlinks to place on that website, communicated an important message about itself... By contrast to the approved link, plaintiffs' website contained partisan political speech, a category to which the Town had historically declined to provide hyperlinks regardless of the viewpoint expressed."

An earlier case, *Page v. Lexington County School District*, 531 F.3d 275 (4th Cir. 2008) had reached a similar result.

Is Social Media Government Speech or a Public Forum?

Government sponsored Facebook or Twitter sites might be more comparable to a public meeting than to a website. Clearly, unless the government chooses not to allow comments, the structure and actual use of tools like Facebook and Twitter invite broad participation and wide ranging commentary. As with any other forum that government chooses to create, these tools can be structured in accordance with the government's purposes. **Facebook principles** already delineate restrictions on certain types of postings, including illegal, hateful or threatening content. Twitter has similar limitations in its **terms of use**. Governments are free to establish other parameters delineating the governmental purposes behind the site, and reserving the right to remove posts that are inconsistent with those purposes. It may be difficult, however, to reap the benefits of public participation in social media if there are too many limitations on what may be posted. This may mean living with controversial or even highly critical comments, just as you would in a public meeting.

Political Social Media Sites

Sometimes individual politicians or private political organizations have their own independent social media presence. Depending upon how they are set up, these may not be considered government forums, even though public officials are using them. Individual politicians who set up their own Facebook pages or Twitter accounts, without governmental sponsorship or funding, are probably not subject to the limitations discussed here.

Links

- www.putnampit.com/
- www.Facebook.com/terms.php
- twitter.com/en/tos#update